

1 UNITED STATES DISTRICT COURT
2 WESTERN DISTRICT OF WASHINGTON AT SEATTLE
3

4 UNITED STATES OF AMERICA, ex)
5 rel, MARIA UCHYTIL,) C12-2091-JCC
6 Plaintiff,) SEATTLE, WASHINGTON
7 v.) October 29, 2014
8 AVANADE, INC., a Washington) Excerpt of the
9 corporation, and AVANADE) Motion Hearing
10 FEDERAL SERVICES, a Delaware) SEATED PER ORDER
11 corporation,) OF THE COURT
12 Defendants.)

13 VERBATIM REPORT OF PROCEEDINGS
14 BEFORE THE HONORABLE JAMES P. DONOHUE
15 UNITED STATES DISTRICT JUDGE
16

17 APPEARANCES:
18

19 For the Plaintiff: Mark Davis
20 Robert Olson
21 Harold Malkin (USA)

22 Also present: Jean DeFond
23

24 For the Defendant: Ex Parte
25

1 (The following is an excerpt from the hearing.)

2 THE COURT: Mr. Malkin, can I ask you to sit outside,
3 but to stay close, because --

4 MR. MALKIN: Absolutely.

5 THE COURT: -- I may be asking you to come back and
6 forth during this time.

7 MR. MALKIN: Absolutely.

8 THE COURT: I'd like to hear from the plaintiffs on
9 this point. And, again, I apologize for having you go back
10 and forth, but I'm trying to get a better sense of where we
11 are without disclosing --

12 MR. MALKIN: Of course.

13 THE COURT: -- or talking about things that have been
14 filed under seal that you are not otherwise aware of. I was
15 going to ask some questions about the first amended
16 complaint, but since you haven't seen that, then I don't
17 think that it would be appropriate for you to be in the
18 courtroom while I did so.

19 MR. MALKIN: Agreed.

20 THE COURT: The record should reflect that Mr. Malkin
21 is leaving the courtroom at the present time.

22 (Mr. Malkin exited the courtroom.)

23 THE COURT: Okay. Mr. Davis, I have the motion and I
24 think you heard some of my questions to the United States.
25 And specifically without keying in on a specific resolution

1 of this matter, which is why don't I hear from the holder of
2 the privilege as the only answer in this case, why don't I
3 hear from you about that particular issue, that is notifying
4 Avande, Inc., the holder, who I believe is the holder of the
5 privilege, then getting their perspectives on these issues so
6 it's not done on an ex parte basis.

7 MR. DAVIS: Sure. And I don't think we necessarily
8 have an objection to that option as a way to proceed here.
9 Although I would echo Mr. Malkin's comments about there may
10 be some materials here that that is not necessary, because
11 it's such a clear issue, that it is either not privileged or
12 the privilege was waived. I think we started to touch on
13 some materials in the first amended complaint, as well as
14 Ms. DeFond's declaration, where clearly there's documents,
15 such as a license agreement, that was widely distributed. I
16 mean, there is no conceivable way that that document could
17 reasonably be subjected to a claim of privilege.

18 THE COURT: Why are you asking me to bless it, if
19 that's the case?

20 MR. DAVIS: Well, it's because --

21 THE COURT: I will tell you one of the concerns I
22 have in here is, I'm trying to be set up as an insurance
23 policy in this case.

24 MR. DAVIS: Um-hum.

25 THE COURT: And I don't particularly like being in

1 that position. If it's clear there's no attorney-client
2 privilege associated with it, why do you need my blessing?

3 MR. DAVIS: And I think that that's because there are
4 multiple layers of documents, and the goal here, I think, is
5 twofold. One is to protect the government. Harold and his
6 team have done a significant amount of work since 2012 to
7 investigate Ms. Uchytel's original complaint, disclosure
8 statement. They interviewed her. They have since taken
9 action to communicate with Avanade.

10 And so there's a danger there that if they start to see
11 materials and we cross that line, for instance we go from the
12 license agreement to a document that may have a stronger
13 claim of privilege, his entire team could be dismissed and
14 the government may be required to start from scratch with an
15 entirely new team. So we're trying to protect the government
16 and Mr. Malkin, as well as take the prudent steps on our end.
17 And I can say that Mr. Olson and myself haven't seen most of
18 what Ms. DeFond has, in an abundance of caution. I mean,
19 we've gotten to that point where we realize there may be some
20 privileged issues here. And the case law tells us that when
21 in doubt, go seek the court's guidance.

22 Beyond coming back to kind of the layers of documents, you
23 know, we start to get into, for instance, this ownership memo
24 of the software. Now, from our position, and advocating on
25 behalf of my client, we think that it's pretty clear evidence

1 that any privilege was waived as to those materials. But I
2 think that's an issue that is appropriate for the court to
3 decide.

4 And that may very well be something that should require
5 motion practice and notice to Avanade. But, again, that's up
6 to the court's discretion. I wouldn't presume to instruct
7 how to proceed on those.

8 THE COURT: You know, there is already, in
9 Ms. DeFond's declaration, an indication that in her view --
10 paragraph 55 says, "Once I reviewed the list of questions, I
11 felt that Mr. Malkin must certainly have obtained a copy of
12 my ownership TMT memo."

13 MR. DAVIS: Um-hum.

14 THE COURT: And I guess, as I said, to a certain
15 extent I have the sense that I'm being asked to be an
16 insurance policy for those issues. Nobody knows how he got
17 that memo, or frankly if he got that memo. But based on the
18 questions asked, Ms. DeFond believes that Mr. Malkin has a
19 copy of that memo.

20 MR. DAVIS: And I can answer that question, Your
21 Honor. Ms. Uchytel also has that memo. That memo is also
22 part of the initial disclosure statement. Now, I don't know
23 the extent that Harold and his team has sat down and read
24 through it in detail. I know that they had it at one point.
25 Through kind of the process of communicating with Avanade,

1 they did raise a claim of privilege as to that document,
2 which is the primary reason the disclosure statement was
3 amended, was to redact that document, as well as to redact
4 portions of two other documents.

5 THE COURT: Okay.

6 MR. DAVIS: So we already know they're going to make
7 a claim of privilege. We think they don't have sufficient
8 grounds to make that claim, for some of the reasons I already
9 mentioned. But we know that that's going to be a
10 battleground nonetheless.

11 THE COURT: Okay. Then here is sort of what I've
12 been thinking, and I want this to be a two-way conversation
13 rather than me just throwing it -- at some point I have to
14 make a decision on it.

15 MR. DAVIS: Sure.

16 THE COURT: But I value and welcome your input in
17 that regard. And what I'm thinking in my stream of
18 consciousness is, I think Ms. DeFond indicated that there
19 might be as many as 1,100 documents that we're dealing with,
20 of which perhaps 100 might be most interesting. And that
21 being the case, it seems to me that one of the things that
22 was popping in my mind, and tell me again, let's reason
23 through this together --

24 MR. DAVIS: Okay.

25 THE COURT: -- is that you would prepare like an

1 attorney -- almost as though you were claiming the privilege.

2 MR. DAVIS: Um-hum.

3 THE COURT: But indicating why the privilege wouldn't
4 attach. But then we would notify Avanade and expect them to
5 come in, and then they could then -- and it may very well be
6 that the only person who could prepare that would be
7 Ms. DeFond herself --

8 MR. DAVIS: Um-hum.

9 THE COURT: -- in that regard. But then send it to
10 Avanade and get Avanade's reaction. And, again, some of
11 those it sounds like it's pretty clear, from what you've
12 said, that based on disclosure to parties who wouldn't
13 otherwise be able to say that the privilege continues after
14 they've had a chance to look at it, the privilege is waived
15 in that regard.

16 MR. DAVIS: Um-hum.

17 THE COURT: And/or issues of the Crime Fraud
18 Exception, and/or some other exceptions that might take
19 place, that I can get Avanade's perspective, and then I can
20 actually make a decision that would give the, what I call the
21 "blessing" that you're looking for. I don't have any problem
22 doing that. I do that in a normal case when I have to make a
23 decision on attorney-client privilege issues, but it's
24 generally not in the context of a Crime Fraud Exception where
25 I hear only from one side.

1 So that is sort of what I've been thinking, as I've been
2 stewing about this issue. But I don't want that to be the
3 only alternative that is available. Tell me how you think --
4 your reactions to that proposal, number one; and alternatives
5 to that proposal that would achieve the goal that you're
6 seeking, but also recognize who the holder of the privilege
7 is.

8 MR. DAVIS: Well, I do think that that makes sense.
9 And as Harold mentioned, when this issue first cropped up,
10 that was kind of our reflexive reaction was to say we really
11 need to have this battle now, as compared to having some kind
12 of limited or full disclosure to the government, and then a
13 year or two from now Avande is going to throw a fit, and
14 perhaps rightly so, and change the entire scope of the case.

15 So especially with the court's comments on not wanting to
16 be an insurance policy, that may be the best thing to do is
17 to provide notice, give them a chance to have due process on
18 the issue, and then wherever that leads as far as a ruling
19 and guidance, that will then tell us what documents we may be
20 able to disclose to the government. And if there would then
21 be a follow-up interview, the government interviewing my
22 client, they will have ground rules on what topics they can
23 and cannot discuss.

24 So that could very well be the best way to proceed here.
25 I think in our motion we tried to give the court other

1 options based on the precedent we were able to find, such as
2 having a pretrial conference, a protective order. I don't
3 know that those measures go as far as going ahead and having
4 notice and a motion practice.

5 So essentially I think, if I can distill my comments, I
6 agree with the court. I think that could be the best option
7 here.

8 THE COURT: Okay. Then I --

9 MR. DAVIS: And if I can just supplement, I'll add to
10 that, because I anticipate -- for instance, we were talking
11 about the TMT ownership memo, we think there is clearly not a
12 privilege or the privilege was waived. I would anticipate
13 that Avanade's counsel will make some kind of argument that
14 Avanade and Accenture are kind of like brother and sister, so
15 somehow the privilege transfers. And I'm sure they'll come
16 up with a creative argument on that issue. So that probably
17 does need to be briefed.

18 THE COURT: Okay.

19 MR. DAVIS: Because that document is so critical to
20 the case.

21 THE COURT: Then let's do this in stages. What I
22 want you to do is figure out a means of identifying the
23 documents that you would like to turn over to the United
24 States.

25 MR. DAVIS: Okay.

1 THE COURT: Then, as I've said, prepare what I'll
2 call a reverse privilege log, why is this not privileged, as
3 a preliminary matter. And then -- so that requires basically
4 Bates stamping each of the documents --

5 MR. DAVIS: Um-hum.

6 THE COURT: -- in this case, so we have a control
7 set. In fact, that should be done in any event. It sounds
8 like documents were put on a computer and then they were
9 transferred, and some other things, and the rest of this.
10 And you really should have some kind of control mechanism.
11 So I would suggest that all of the documents be Bates stamped
12 that are in Ms. DeFond's possession.

13 Then you can identify, by Bates numbers, those documents
14 that you believe are not privileged.

15 MR. DAVIS: Um-hum.

16 THE COURT: And as I said, prepare a reverse
17 privilege log. Then once that is prepared you can send those
18 materials to me and I will then direct also which materials
19 should be turned over to Avanade for comment, and then we'll
20 do a motions practice on determining which documents can be
21 disclosed and turned over, which ones are not.

22 MR. DAVIS: Okay.

23 THE COURT: But then I think that provides a vehicle
24 for -- and until such time as a decision is reached, then
25 these documents are not to be turned over to the United

1 States.

2 MR. DAVIS: Okay.

3 THE COURT: But we'll do it on an accelerated basis.
4 I think you have been sitting around, and the United States
5 frankly has been sitting around long enough that we'll
6 expedite that issue, and then we'll have a session and we'll
7 go through each of the documents. I'll hear from you and
8 I'll hear from Avanade's counsel, and I'll make a decision.
9 And there is either privilege attached to it or there's
10 privilege not attached to it.

11 MR. DAVIS: Okay.

12 THE COURT: And then once that decision is made, then
13 it seems to me, then, those issues can be discussed -- excuse
14 me, then it seems to me that I'll come up with an order. But
15 that will give me the benefit of hearing what Avanade has to
16 say about that issue. And that should then give what I will
17 call the insurance or the blessing to be able to do this,
18 because they'll be turned over pursuant to court order in
19 that regard. And I will feel more comfortable doing it,
20 because it will not be on an ex parte basis.

21 MR. DAVIS: Okay. That makes sense.

22 THE COURT: Okay. What is your sense of timing as to
23 when I can expect these?

24 MR. DAVIS: I would need to confer with my client a
25 little bit. Like I said, we haven't seen a great deal of

1 what she has, so it's tough to say.

2 THE COURT: Again, my recommendation to you is get a
3 control set. And I'm not sure that -- it's one of those
4 things that -- or she should have a control set, in any
5 event.

6 MR. DAVIS: Okay.

7 THE COURT: I don't want to be setting up any kind of
8 a motion to disqualify you --

9 MR. DAVIS: Yeah, exactly.

10 THE COURT: -- for example, for having reviewed
11 privileged materials. Work through that process. Ms. DeFond
12 can set up, it seems to me, some kind of a controlled
13 process. But keep in mind the difficulties of chain of
14 custody issues. Then perhaps it is Ms. DeFond who would then
15 be preparing those things and saying: These are the
16 documents I'm going to show you, as my attorney --

17 MR. DAVIS: Um-hum.

18 THE COURT: -- because I believe these are not
19 privileged documents. And it seems to me if you follow that
20 basis, then the ability for somebody to say, "Judge, we want
21 to disqualify Mr. Davis because he's viewed privileged
22 documents," is significantly diminished, the risk of that is
23 significantly diminished, because, in fact, you have followed
24 this particular procedure.

25 So, talk with Ms. DeFond, then send -- in fact, what I'm

1 going to suggest is that you actually send me a protocol for
2 how you wish to do it, so I can then say, follow that
3 protocol, and I'll expect these documents by this time. And
4 I'll send that out in an order after you send me your
5 protocol.

6 MR. DAVIS: Um-hum.

7 THE COURT: And then assuming you followed the
8 protocol, then it seems to me that further insulates you from
9 any kind of a motion to disqualify, based on -- and obviously
10 you're not going to be looking at any documents that are, on
11 its face, privileged documents in this matter. But those
12 that Ms. DeFond, who is an experienced attorney, has good
13 reason to believe might not be privileged, either for the
14 Crime Fraud Exception, for the fact that it's been disclosed
15 to a third party as to whom the privilege would not attach,
16 or other reasons, then it seems to me if you followed that
17 protocol the odds of you being disqualified for having
18 reviewed something that I might later still say that the
19 privilege attaches, would diminish.

20 We have a claw-back provision, as a general proposition,
21 as you know, in the Rule 26 that talks about if there is
22 inadvertent disclosure of attorney-client privilege
23 documents, there's a claw-back provision. And it doesn't
24 mean that the attorney would be disqualified in that case.

25 So it seems to me if you set up this protocol with the

1 general guidelines that I'm suggesting, and then send that
2 protocol to me, I will review the protocol, make some
3 comments on it, and then Ms. DeFond can get to work on
4 outlining who -- I'll call it the anti-privilege log rather
5 than a privilege log -- but following that same basis as to
6 why it should be. Then we can notify Avanade. And Avanade
7 can let its views be known. And that being the case, then as
8 I said, it seems to me that as long as you're not reviewing
9 all these other documents that a privilege might still attach
10 to --

11 MR. DAVIS: Um-hum.

12 THE COURT: -- it seems to me that that's a process
13 that provides protection both for your client and for you in
14 that regard.

15 MR. DAVIS: Yeah, and we appreciate that. I think
16 that that's a reasonable way to proceed here. And, again, I
17 think that's, from a bigger picture, that's exactly why we
18 are here --

19 THE COURT: Okay.

20 MR. DAVIS: -- is to establish that kind of protocol.
21 And if there's something that we're missing, or something you
22 want to add, we would appreciate your input on the protocol.

23 THE COURT: I will review your proposed protocol
24 carefully, and I will then issue an order regarding that
25 process. And the protocol -- and I will also then notify --

1 we'll need to make sure that Avanade gets notice once we're
2 in the process of -- once I've received the claimed privilege
3 waived, or non-privileged applicable documents, then Avanade
4 will get a copy of it. And as I said, hopefully it will --
5 I'm hoping, for my own sake, that it will not involve 1,000
6 documents. But perhaps the -- and I'm confident at some
7 point I'm going to direct the parties, just so you're aware,
8 to meet and confer and figure out which ones are really the
9 documents that the court -- you want me to jump in. There
10 will probably be agreement on a number of documents saying,
11 no privilege attaches because of waiver or other issues. But
12 -- so there will be a meet-and-confer component. And then
13 ultimately as to those documents, hopefully relatively few
14 that the parties can't reach agreement on, then I'll make a
15 decision on it.

16 So do you have sort of the general idea that I think
17 we're --

18 MR. DAVIS: I think so. And as to your comments
19 about expediting the process, we can certainly do that, to
20 the best of our ability. In discussing this and trying to
21 analyze this, we have talked about this very possible
22 mechanism for proceeding. So I think we have a good
23 understanding as to what the court wants, and how we should
24 proceed from here. So we'll do that promptly.

25 THE COURT: Okay. Then, let's see, is there anything

1 else that you'd like to discuss while Mr. Malkin is --

2 MR. DAVIS: May Ms. DeFond make some statements or
3 ask some questions of the court?

4 THE COURT: She could. Good morning, Ms. DeFond.

5 MS. DEFOND: Good morning, Judge. I would like to
6 ask a couple of questions. I have many documents in my
7 hands, some of which are completely unrelated to this matter.
8 And I would hope that my task is to catalog the documents
9 that relate to the qui tam matter, and to then produce the
10 list, or the reverse privilege list that you have indicated,
11 and select and cull an even more selective group of documents
12 that are really at issue, or that really, you know, tell the
13 story, or that really need a decision about privilege.

14 I would hope not to have to catalog literally three or
15 four years of e-mails about wide numbers of matters.

16 THE COURT: This is a recommendation for you, and it
17 is not a directive, because I'm not going to tell you how to
18 sort of practice law or to preserve documents or things of
19 that nature, but I get involved in a number of cases where
20 there are issues involved alleging spoliation. And I would
21 recommend that you have -- that you consider talking with
22 somebody who knows something about anti-spoliation law. So
23 if you have it on disks, or if you have it on a hard drive,
24 it is preserved appropriately.

25 MS. DEFOND: Um-hum.

1 THE COURT: So there is no suggesting that you were
2 playing fast and loose with the hard drive, or the CDs, or
3 anything else in that regard.

4 MS. DEFOND: Um-hum.

5 THE COURT: And that they actually do the work of
6 having a -- of copying the entire thing and preserving it.
7 And then from that, then -- and making two copies, one which
8 is a sealed copy --

9 MS. DEFOND: Um-hum.

10 THE COURT: -- or something. And the services will
11 know how to do it. I'm not telling you how to do this.

12 MS. DEFOND: Um-hum.

13 THE COURT: Where you have one that is kept, and
14 perhaps you even want to put it in some kind of an escrow
15 account or leave it with your attorneys, or in some fashion
16 where there is no question that when they made this copy that
17 you're producing these things from, you also made this copy
18 and somebody can compare the two.

19 MS. DEFOND: Um-hum.

20 THE COURT: So there isn't any suggestion that you've
21 added or deleted something from it.

22 MS. DEFOND: Yes, I understand.

23 THE COURT: Anyway, there are services that can do
24 that. And you shouldn't rely on my advice in that regard for
25 how to do it. There are services that can do that, that can

1 then talk about how to preserve -- make sure that you've
2 preserved the state of evidence.

3 MS. DEFOND: Um-hum.

4 THE COURT: That being the case, I'm really not
5 interested in all of the items that are on the computer or on
6 your hard drive that have no relation to this. What I'm
7 interested in are documents that relate to the possibility of
8 the qui tam action. And that those would be documents that
9 would be, in that process of preserving these issues, that
10 you perhaps print -- it's a suggestion, again, you can use a
11 service that knows how to deal with these issues in court.

12 MS. DEFOND: Um-hum.

13 THE COURT: But that they then print out, perhaps,
14 again, an individual copy that Bates stamps those saying this
15 one relates to the qui tam action, this one does not. Nobody
16 is interested, in this action, in other issues that you have
17 with your former employer in this case.

18 MS. DEFOND: Understood.

19 THE COURT: So I'm not interested in four years of
20 e-mails that are going out there. But that being said, you
21 may wish to make sure that you've taken steps to preserve,
22 electronically, a copy of those materials along the lines
23 that I've said, by retaining a service to assist in that
24 process.

25 But ultimately with respect to, then, the documents that

1 you're saying, "I think these are the things that are
2 appropriate," burn off a copy of those and Bates stamp those,
3 so we have a control set. And those are the things that I'm
4 primarily interested in, because the privilege examination
5 will be document by document. And issues that are not
6 relevant to the qui tam action strike me as there's no reason
7 to be including this at this time.

8 Now, again, that being said, I can anticipate the defense
9 in this case saying: Give us access to that computer, the
10 whole thing. I can just see that happening. And if there's
11 any sense of spoliation that has taken place, that will have
12 a huge impact. That is, if you start deleting things now
13 because you're saying: Oh, those don't relate to that, and
14 this is a private matter, and this is X, Y, and Z --

15 MS. DEFOND: Um-hum.

16 THE COURT: -- that's a horse of a different color.
17 You need to preserve that hard drive. You need to preserve
18 that evidence. And then you can fight those discovery issues
19 in another place. But if you start withdrawing or getting
20 rid of documents, that's why it's important to have a service
21 be able to come in and say: Yes, we got this from
22 Ms. DeFond. We took it, and we took these exact steps. We
23 duplicated this thing by doing the following processes, one,
24 two, three, four, five, and we've preserved a copy of it.

25 And to the extent that there are some personal items on

1 it, or the rest of that, don't delete it, because you're
2 going to be accused of getting rid of some documents.

3 MS. DEFOND: Um-hum.

4 THE COURT: So you have that preservation made.

5 MS. DEFOND: Um-hum.

6 THE COURT: Then to the extent, as I said, if there's
7 subsequent litigation and they say they want to look at these
8 things, then somebody can say, no, she wasn't making improper
9 deletions, but these items really are not relevant to this
10 issue.

11 MS. DEFOND: Um-hum.

12 THE COURT: And we can confirm this by X, Y, Z.

13 That's a discovery dispute for another day.

14 MS. DEFOND: Okay.

15 THE COURT: But don't make that decision now on your
16 own, or you'll be accused of evidence spoliation.

17 MS. DEFOND: Um-hum.

18 THE COURT: So, get a service. The only things that
19 I'm interested in you printing out right now and putting
20 Bates stamps on it are documents you believe could be
21 privileged, associated with --

22 MS. DEFOND: With this matter.

23 THE COURT: Yes, ma'am.

24 MS. DEFOND: Yes.

25 THE COURT: Does that help?

1 MS. DEFOND: Yes, that helps a great deal. And I've
2 always imagined that I would either be required, or at least
3 permitted, to return the hard drive to them.

4 THE COURT: Well, at some point. As I said, this is
5 where things can get a little bit nasty on it. And I'm not
6 giving you legal advice. You have to follow it from your
7 attorneys and from the services that are out there. But I
8 would suggest that you consider duplicating that and having a
9 master on this. And that -- sort of two masters, one that
10 can you work on, work with --

11 MS. DEFOND: Um-hum.

12 THE COURT: -- and then one that is preserved
13 someplace else so that there's no question about it.

14 MS. DEFOND: Um-hum.

15 THE COURT: But the services that are out there will
16 be able to talk to you about that.

17 MS. DEFOND: Will know that. Um-hum. May I ask one
18 more question?

19 THE COURT: You may.

20 MS. DEFOND: When we contemplate the preparation of
21 this list, you know, and then the arguments, conferring at
22 least at first with Avanade about the various documents that
23 I have identified as most important, would that be -- it
24 seems to me that it would be after disclosing to them the
25 existence of the qui tam action. But I'm not clear on that,

1 because you haven't exactly said that.

2 THE COURT: I haven't said anything about disclosing
3 the qui tam action.

4 MS. DEFOND: Um-hum.

5 THE COURT: I frankly don't know what the rules are
6 in terms of this and the United States. That will have to be
7 something that will probably seek further input. And I'll
8 ask Mr. Malkin to come in. But it seems to me that
9 everything right now is being done under seal.

10 MS. DEFOND: Um-hum, yes.

11 THE COURT: And will remain under seal. So I don't
12 intend that -- I wouldn't expect that you would be disclosing
13 the existence of a qui tam action, unless and until -- excuse
14 me. I'm not authorizing the disclosure. I'm not prohibiting
15 it. I don't know how it works, to tell the truth. So I'm
16 neither authorizing nor prohibiting the disclosure of the
17 existence of the lawsuit. It was filed under seal for a
18 reason. I don't know what the next steps are --

19 MS. DEFOND: Um-hum.

20 THE COURT: -- in that case. You'll have to seek
21 legal advice. But we will carefully go to the next step,
22 which is figure out -- and I will hear from you and from the
23 United States about how to notify Avande of the potential --
24 of the attorney-client privilege claim and the discussion on
25 it.

1 MS. DEFOND: Um-hum.

2 THE COURT: And we will then figure out what else
3 gets disclosed, and what else doesn't get disclosed. But
4 that's not in front of me right now.

5 MS. DEFOND: Okay. Um-hum.

6 THE COURT: Right now is just the process of
7 segregating the documents that you believe are appropriate to
8 this matter, and that are not privileged.

9 MS. DEFOND: Very good. Thank you.

10 THE COURT: Okay. Does that make any sense? So I'm
11 not authorizing or prohibiting. I don't know what the next
12 step is, to be quite frank with you.

13 MS. DEFOND: I'm glad for the instruction to neither,
14 you know --

15 THE COURT: No, no, no, my instruction is I'm not
16 giving you any instruction. Because you'll need to seek
17 guidance from your attorneys in that regard, because I don't
18 know that. And I will be seeking input from the United
19 States and from your attorneys prior to actually engaging in
20 the next step, which is to, once we have that, is to figure
21 out how to notify Avanade of this and to solicit their input.
22 So it's going to be a step-by-step process.

23 MS. DEFOND: Yes, Your Honor. Very good.

24 THE COURT: Anything else?

25 MS. DEFOND: Not that I can think of right now.

1 THE COURT: Anything else before I invite Mr. Malkin
2 in?

3 Okay. My courtroom deputy will invite him to return.

4 (Mr. Malkin returned to the courtroom.)

5 (The excerpt concluded.)
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C E R T I F I C A T E

I, Debbie Zurn, RMR, CRR, Official Court Reporter for
the United States District Court in the Western District of
Washington at Seattle, do hereby certify that I have
transcribed the digital tape of the above-proceedings to the
best of my skill and ability.

/s/ DEBBIE ZURN

DEBBIE ZURN, RMR, CRR
Official Court Reporter